No. 90-98

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

GEORGE FRANKLIN, et al.,
Petitioners,

v.

PEAT MARWICK MAIN & CO., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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Pursuant to Rule 37.2 of the Rules of this Court, the National Association of Securities and Commercial Law Attorneys ("NASCAT") respectfully moves for leave to file the enclosed brief as *amicus curiae* in support of Petitioners. Counsel for the Petitioners has granted consent to file this brief. Counsel for the Respondents have refused to consent to the filing of this brief.

NASCAT is an association of law firms consisting of approximately 500 attorneys located throughout the United States whose purpose is to promote the enactment and enforcement of legislation which protects investors from deceptive and manipulative practices and to ensure that the securities markets operate in a fair and free manner. NASCAT members have represented plaintiffs in a variety of individual and class action contexts under the federal securities laws. NASCAT members have also represented defendants in securities and other complex cases.

NASCAT and its members have a strong interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetrating securities violations upon public investors. The issues raised by the Petition are extremely important to the investment community and the capital markets generally. The Ninth Circuit's decision in *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (the "Opinion"), as it relates to the availability of contribution and the impact of partial settlements on contribution rights, unduly restricts the effectiveness of the federal securities law and contravenes Congress' intent in passing those laws. The Opinion ensures that the trial courts of the United States will be clogged with unnecessary litigation with no increased benefit to litigants or the judiciary. It erects unwarranted impediments to legitimate and good faith settlements—all for the stated purpose of doing "equity" to persons who have been found, after trial and appeal, to be wrongdoers. *Franklin v. Kaypro Corp., supra,* 884 F.2d at 1231.

The enclosed *amicus curiae* brief addressses the two specific legal issues raised by the Petition: (1) the appropriate settlement bar rule to be applied in those circumstances where Congress, by statute, has created a right of contribution; and (2) whether, under Section 10(b) of the Securities Exchange Act of 1934, and

Rule 10b-5 promulgated thereunder, or under Section 12(2) of the Securities Act of 1933, there exists an implied right of contribution.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

As explained in the foregoing motion for leave to participate as amicus curiae, NASCAT is a national association of law firms consisting of approximately 500 attorneys located throughout the United States. NASCAT's primary purpose is to facilitate the protection of investors and other consumers through appropriate legislative and judicial activity.

The issues raised by the Petition are extremely important to the management of complex, multi-party litigation in the federal courts. The Ninth Circuit's decision in *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (the "Opinion"), as it relates to the availability of contribution under the federal securities laws, and the impact of partial settlements on contribution rights, unduly restricts the effectiveness of the federal securities laws and contravenes Congress' intent in enacting those laws. In essence, the Opinion ensures that the trial courts of the United States will be clogged with unnecessary litigation with no additional benefit to litigants or the judiciary. It erects unwarranted impediments to legitimate and good faith settlements—all for the stated purpose of doing "equity" to persons who have been found, after trial and appeal, to be wrongdoers. In addition, the Opinion overlooks or rejects contrary decisions from other Circuit Courts and fails to correctly analyze the desirability and wisdom of allowing parties and trial courts to effectuate partial settlements in complex, multi-party actions. Specifically, the Second and Third Circuits have reached results contrary to the Opinion. As such, there exists a serious conflict among the Circuits on important legal issues which affect the administration of justice and the interpretation of the federal securities laws. Based on the discussion presented here and in the Petition, we believe that the Petition should be granted so that this Court can resolve these important and controverted legal issues.

SUMMARY OF ARGUMENT

Where express rights of contribution exist under the federal securities laws, this Court should recognize that the appropriate settlement bar rule is based on the *pro tanto* rule. This rule should

have the following components: (i) it should be applicable only to partial settlements entered into in "good faith;" (ii) plaintiffs' claims against non-settling tortfeasors should be reduced by the settlement payment made by the settling tortfeasors; and (iii) tortfeasors who settle with plaintiffs should be protected from all claims for contribution and indemnity by nonsettling tortfeasors arising out of the alleged wrongful conduct. The adoption of such a rule would foster important public policy goals of encouraging settlements, protecting investors and carrying out Congress' objectives in enacting the federal securities laws while at the same time protecting the legitimate interests of non-settling defendants.

Further, this Court should review whether an implied right of contribution exists under Section 10(b) of the Securities Exchange Act of 1934 or Section 12(2) of the 1933 Securities Act in light of the Court's holding in *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981) and *Northwest Airlines, Inc. v. Transport Workers Union of America AFC-CIO*, 451 U.S. 77 (1981).

ARGUMENT

I

THE SETTLEMENT BAR RULE ANNOUNCED BY THE NINTH CIRCUIT IN *KAYPRO* IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND IS CONTRARY TO CONGRESS' INTENT IN ENACTING THE FEDERAL SECURITIES LAWS

The settlement bar rule announced by the Ninth Circuit in *Kaypro* admittedly will discourage the prompt resolution of multiparty litigation through good faith settlements. It does so by completely ignoring the Third Circuit's decision in *Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101, 109 (3d Cir. 1981). The Opinion even admits that it is at odds with, and therefore rejects, the recent Second Circuit decision in *Singer*

v. Olympia Brewing Co., 878 F.2d 596 (2d Cir. 1989).[1] Moreover, the Opinion ignores the historical evolution of good faith settlements and bar orders as promulgated by the American Law Institute. In so doing, the Opinion creates conflicts among the Circuit Courts. Indeed, since its promulgation, district courts in the First and Seventh Circuits have rejected, as unsound, the settlement bar rule promulgated by the Ninth Circuit in *Kaypro*. *See Dalton v. Alston & Bird*, [Current Binder], Fed.Sec.L.Rep. (CCH) ¶ 95,348 (S.D.Ill.1990); *In re Atlantic Financial Management, Inc. Securities Litigation*, 718 F.Supp. 1012 (D.Mass.1989).[2]

Settlement bar rules implemented under state statutes or by judicial decisions can be classified broadly into two categories: *pro tanto* and *pro rata* (or proportional). Under the *pro tanto* rule, a plaintiff's claims against non-settlors are reduced by the amount of the payment received from a settling defendant; the settling defendant is protected from claims for contribution and indemnity that might be asserted by non-settlors. The rule protects the settling defendants from further exposure in connection with the action and assures the plaintiff that his claims against the non-settlors will be reduced only by the amount of the settlement. The *pro tanto* ruie also protects non-settlors in that any partial settlement which purports to bar claims for indemnity and contribution must be made in "good faith." The *pro tanto* rule is generally recognized as a rule that promotes settlement. It assures plaintiffs that they will be made whole if they prevail against any

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[1] The ruling of the Second Circuit in *Singer* is in line with the holdings in numerous other circuits. *See, e.g., Gould v. American-Hawaiian Steamship Co.*, 535 F.2d 761, 784 (3d Cir. 1976); *Screen Gems—Columbia Music, Inc. v. Mettis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972); *Makethan v. Burrus Cootes & Burrus*, 545 F.2d 1388, 1390 (4th Cir. 1976), *cert. denied*, 434 U.S. 826 (1977); *Gill v. United States*, 429 F.2d 1072, 1079 (5th Cir. 1970).

[2] Since the *Kaypro* Opinion was rendered, the Ninth Circuit in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989) refused to adopt the *Kaypro* settlement bar rule in an admiralty case and instead approved the use of a *pro tanto* settlement bar rule to extinguish claims for contribution. *Id.* at 907-908.

one of the joint tortfeasors. *Miller v. Apartments and Homes of N.J., Inc., supra,* 646 F.2d at 109; *Seymour v. Summa Vista Cinema, Inc.,* 809 F.2d 1385, 1389-90 (9th Cir. 1987), *as amended,* 817 F.2d 609 (9th Cir. 1987).

Under a *pro rata* (or proportional) settlement bar rule, which the Opinion erroneously adopts, the settling defendants are also protected from claims which might be asserted by the non-settlors. The plaintiff's claims against the non-settlors, however, are reduced—not by the amount of the partial settlement—but by the settlors' proportionate share of liability as determined at trial where they are not present as parties and *after* consummation of the partial settlement. This approach limits the risk of trial to the non-settling defendants, encourages the non-settling defendants to refuse to settle on a fair basis, discourages settlements and increases the likelihood of unnecessary trials. For example, non-settlors do not run the risk that the settling parties paid too little. The risk of "underpayment" instead is borne solely by the plaintiff. As such, a plaintiff is very reluctant to settle with less than all defendants unless there is a substantial premium built into the partial settlement to "pay" for the unknown risk which plaintiff would be assuming. This result will necessarily prolong litigation without any real or significant benefit to the parties but with a very real detriment to the judicial system.[3]

The settlement inhibiting effects of the *pro rata* (or proportional) rule were recognized by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), which amended the *Uniform Contribution* Among Tortfeasors Act ("Uniform Act") in 1955 to move *from* the *pro rata* rule to the *pro tanto* rule precisely because the *pro rata* rule discouraged settlements. *Miller v. Christopher, supra,* 887 F.2d at 906-907. The NCCUSL's comment, based on real world experience, on this change demonstrates the serious flaws in the Opinion:

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[3] This issue is especially important in light of the burgeoning savings and loan crisis, which is now engulfing the federal courts with complex, multi-party litigation. *See, e.g., In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation,* 130 F.R.D. 475 (J.P.M.L.1990).

> The 1939 Act provided, in Section 5, that a release of any tortfeasor should *not* release him from liability for contribution unless it expressly provided for a reduction "to the extent of the pro rata share of the released tortfeasor" of the injured person's recoverable damages. *This provision has been one of the chief causes for complaint where the Act has been adopted, and one of the main objections to adoption.*
>
> * * *
>
> The effect of Section 5 of the Act has been to discourage settlements in joint tort cases, by making it impossible for one joint tortfeasor alone to take a release and close the file. *Plaintiff's attorneys are said to refuse to accept any release which contains the provision reducing damages "to the extent of the pro rata share of the released tortfeasor," because they have no way of knowing what they are giving up.* The "pro rata share" cannot be determined in advance of judgment against the other tortfeasors . . . .
>
> *No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. Some reports go so far as to say that the 1939 Act has made independent settlement impossible.*

Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in Its Sixty-Fourth Year, 223-24 (1955) [Emphasis added.] *Miller v. Christopher, supra,* 887 F.2d at 907. In an effort to encourage non-collusive settlements, the NCCUSL amended the Uniform Act to provide for a *pro tanto,* rather than a *pro rata,* settlement bar rule provided settlements were entered into in "good faith." *Id.* at 906-907; *FSLIC v. Butler,* 904 F.2d 505, 511 (9th Cir. 1990).

The Third Circuit considered these same competing policies in *Miller v. Apartment and Homes of New Jersey, Inc.,* 646 F.2d 101 (3d Cir. 1981). *In Miller,* the Third Circuit found that a right to contribution existed in an action brought under 42 U.S.C. § 1982

and the Fair Housing Act. *Id.* at 108. In so doing, the Court noted that:

> Contribution rules are of high importance in the process of settling claims before trial. Consequently, the selection of a contribution rule bears on the work of the federal courts as well as on the substantive rights and liabilities of the parties.

Id.

In developing the appropriate "contribution" rule, the Third Circuit in *Miller* identified three specific policy considerations. First, the court in *Miller* recognized that:

> [The] law generally seeks to assure the tort victim neither more nor less than one complete satisfaction of his claim. A rule of *pro tanto* reduction accomplishes this goal. A rule of *pro rata* reduction frustrates it to the extent that the plaintiff makes a good or a bad settlement.

Id. at 109. Contrary to the foregoing, the Opinion suggests that a plaintiff should be willing to forego a complete satisfaction of his claim even if the claim is fully and successfully litigated. The Opinion further suggests that a partial settlement means that a plaintiff has somehow voluntarily agreed to something less than a full satisfaction of his claim. This is wrong. Moreover, it is contrary to the settled law of, at least, the Second and Third Circuits. *See, e.g., Singer v. Olympia Brewing Co., supra,* 878 F.2d at 660.

The *Miller* court also identified other appropriate policy factors:

> Second, the law seeks to encourage settlements. A rule that the settling defendant will remain liable to contribute after an award against a non-settling defendant would impede settlements. So would a rule that the plaintiff must give non-settling defendants the benefit of a *pro rata* reduction in their liability. The 1939 Uniform Contribution Among Tortfeasors Act emphasized competing policies rather than the policy of promoting settlements. Section 4 of the 1939 Act required a *pro tanto* credit for the amount of settlements the plaintiff received. However, Section 5 declared that settling defendants remained liable to contribute to non-settling defendants unless the release provided for a *pro rata* reduc-

tion of the plaintiff's damages recoverable against all the other tort-feasors. *The 1955 Uniform Contribution Among Tort-feasors Act abandoned that policy choice.* The 1955 Act retains the direct *pro tanto* credit rule. But section 4(b) now provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of the two or more persons liable in tort for the same injury or the same wrongful death; . . . (b) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

See, 73 A.L.R.2d 403 (1960).

Miller v. Apartment and Homes of New Jersey, Inc., supra, 646 F.2d at 109.

By 1955, leading experts in the field recognized that such an approach made multi-party settlements on a partial basis virtually impossible. *Miller v. Apartment and Homes of New Jersey, Inc., supra,* 646 F.2d at 109. As a direct result, the 1955 version of the Act adopted the *pro tanto* rule of contribution. *FSLIC v. Butler, supra,* 904 F.2d at 511. Unless the Petition is granted and the Opinion reversed, virtually no partial settlements of complex multi-party litigation will be entered into in the Ninth Circuit, thus needlessly causing an increase in complex litigation. Such a result is contrary to the public policy of encouraging the settlement of litigation, especially complex litigation. *Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976).

The third policy factor identified by the Third Circuit in *Miller* consisted of the relative equities among wrongdoers. In this regard, the Third Circuit in *Miller* stated:

> A rule of *pro rata* reduction achieves the goal of equality albeit at the expense of other values. The same could be said of the rule of the 1939 Act which held a settling defendant liable to contribute.

Miller v. Apartments and Homes of New Jersey, Inc., supra, 646 F.2d at 109.

The Opinion places primary, if not sole, weight on this factor. Such reliance, however, is totally misguided. As the Opinion candidly admits, "we are speaking of equities between wrongdoers." *Kaypro, supra,* 884 F.2d at 1231. Nevertheless, the Opinion concludes that *it is equitable to protect proven wrongdoers from those it has victimized.* This is not equity. Indeed, it makes a mockery of the very essence of equity. A non-settling defendant (or their insurers) should not receive an economic windfall solely because certain co-defendants (or their insurers) have chosen to act responsibly and to settle a lawsuit in good faith.

The Third Circuit in *Miller* recognized as much when it established the controlling settlement bar rule. As the Third Circuit held:

> In making our choice, we accord the least weight to the third principle [*i.e.*, equities among joint tortfeasors]. We believe that parties generally will have sufficient incentive to negotiate settlements as vigorously as they can, and that in most cases the settlements achieved will not deviate unacceptably from the aimed for proportionality of payment. We further believe that in most cases favoritism will present no problem, and that skilled attorneys will be able to discover collusive settlements and avoid the feared harmful effects of the collusion.[4] We see no necessary conflict between the first two policies. The policy of allowing complete satisfaction is furthered by a rule of *pro tanto* credit. And the rule of *pro tanto* credit is plainly preferable to a rule of *pro rata* credit in civil rights cases, *where one or more defendants have settled*

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[4] The Opinion contends that trial courts are incapable, in a good faith hearing, of determining whether a proposed settlement is fraudulent or collusive. This is incorrect. Trial courts, on a daily basis, make serious decisions affecting the lives and property of persons which decisions are subject to review. Furthermore, the suggestion that a good faith hearing requires "a full evidentiary hearing on all of the parties' relative culpabilities" is simply wrong. *See Miller v. Christopher, supra,* 887 F.2d at 907-908.

> *with a plaintiff, the damages recoverable by that plaintiff shall be reduced by the amount of the settlement received.*

Id. at 109-110.[5]

The Ninth Circuit recently cited the *Miller* case with approval in a securities case. *Seymour v. Summa Vista Cinema, Inc., supra,* 809 F.2d at 1389. In Seymour, the Ninth Circuit approved the use of the *pro tanto* rule by stating that:

> We start with the fundamental principle that a payment made by a joint tortfeasor diminishes the claim against the remaining tortfeasors . . . .
>
> * * *
>
> While the district court's approach is without precise precedent, it comports with the policies of the law in this area. *The foremost of these is assuring the tort victim one complete satisfaction of his claim, neither more nor less. Miller v. Apartments and Homes of New Jersey, Inc.,* 646 F.2d 101, 109 (3d Cir. 1981). By deducting the fair market value of the settlement agreement, the district court provided plaintiffs one satisfaction of their claim. Although future events may diverge from the district court's prediction, the determination must be made as of the time of the judgment. Our system of justice cannot provide certainty; a *fair and reasonable approximation in light of the facts available when the court makes its decision suffices.* The district court's approach also serves another policy, that of encouraging settlement even with those whose present financial condition may be less than optimal. *Adopting Alexander's proposed ap-*

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[5] This Court modified the scope of *Miller* when it held that where there is a comprehensive Congressional statutory scheme, such as Title VII or the Equal Pay Act, *no* rights of contribution will be judicially implied. *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77 (1981). Where a right to contribution does exist, however, the *Miller* analysis is very relevant because it considers each of the policy issues and weighs each appropriately. As such, *Miller* is directly on point. The Opinion, however, fails to mention *Miller* or weigh the important policy factors identified by the Third Circuit in that case.

> *proach might well deter plaintiffs from settling with impecunious defendants for fear that a paper judgment will bar recovery against solvent defendants.*

Id. at 1389-90. [Emphasis added.] The holding by the Ninth Circuit in *Seymour* is inconsistent with the Opinion since *Kaypro* expressly envisions situations where a tort victim will not receive complete satisfaction even if victorious.

The Ninth Circuit specifically recognized that its Opinion was contrary to the holding of the Second Circuit in *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-600 (2d Cir. 1989). *Kaypro, supra,* 884 F.2d at 1230. Not surprisingly, since the Opinion was rendered, district courts in—at least—the First and Seventh Circuits have also rejected the *Kaypro* Opinion. For example, in *Dalton v. Alston & Bird*, [Current Binder], Fed.Sec.L.Rep. (CCH) ¶ 95,348 (S.D.Ill.1990), an Illinois district court carefully weighed the public policy considerations raised in *Kaypro* and *Singer* and chose the *Singer* rule. In so doing, the *Dalton* court held:

> The Court believes that the *Singer* approach is the better approach to this problem. First, the *Singer* approach is much easier in application. The jury need not determine the relative fault of all defendants, including those defendants who are no longer participating in the trial. Under the *Franklin* approach an exact apportionment of liability needs to occur at some point, *i.e.*, at the trial. Second, the *Singer* approach is equitable. The fairness hearing ascertains whether the settlement is fair in light of the potential liability of the defendant and in light of the chance of recovery. Thus, the fairness hearing prevents other defendants from paying far in excess of their share of liability. Even under the one-satisfaction rule, fairness hearings need not become more complicated than they already are. Under the one-satisfaction [rule], no such apportionment ever needs to be made. Third, the *Singer* approach provides finality to the settlement. Under the *Singer* approach, the settling defendants are no longer a part of the litigation, and thus large portions of the trial may be omitted. Under the *Franklin* approach, the settling defendants' liability needs to be determined, and thus

> their activities remain part of the trial. Fourth, the *Singer* approach encourages settlements, while the Franklin approach discourages settlements. Under *Singer*, the uncertainties of trial are increased, and thus parties are more likely to settle. Under *Franklin*, a party is guaranteed that it will never pay more than its share of the damages, thus decreasing the risks of trial.

Dalton, supra, ¶ 95,348 at 96,684.

Similarly, in *In re Atlantic Financial Management, Inc. Securities Litigation*, 718 F.Supp. 1012, 1018 (D.Mass. 1989), the district court followed *Singer* and explained the drawbacks of the Ninth Circuit's *Kaypro* approach:

> Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty . . . . Furthermore, in complex securities litigation, the burden on the jury's time and perception is already considerable. To add to this burden the task of apportioning fault between absent and present defendants would obviate much of the advantage of partial settlement to the judicial system itself.

Where contribution claims do exist, this Court should reject the *pro rata* (or proportional) concept embraced in the Opinion. Such a settlement bar rule is inconsistent with Congressional purpose of the federal securities laws. Public policy and Congressional intent behind the federal securities laws is so strong that investor protection cannot and should not be subordinated to the relative "equities among wrongdoers." As this Court recently stated with respect to the 1934 Securities Exchange Act:

> The 1934 Act was designed to protect investors against manipulation of stock prices. Underlying the adoption of extensive disclosure requirements was a legislative philosophy: "There cannot be honest markets without honest publicity" . . . . This Court "repeatedly has described the 'fundamental purpose' of the Act as implementing a 'philosophy of full disclosure.' "

Basic, Inc. v. Levinson, ___ U.S. ___, 108 S.Ct. 978, 982 (1988) (citations omitted). *See also* H.R.Rep. No. 85, 73 Cong.

1st Sess. 8 (1933); S.Rep. No. 47, 73 Cong. 1st Sess. 1 (1933) (setting forth similar purposes for the 1933 Securities Act). Instead, this Court should recognize a *pro tanto* settlement bar rule for use in actions brought by investors under the federal securities laws where there are express rights of contribution. The rule should have the following components: (i) it should be applicable only to partial settlements determined to have been entered into in "good faith" after notice to all parties and a "good faith" hearing is held; (ii) plaintiffs' claims against non-settling tortfeasors should be reduced by the settlement payment made by the settling tortfeasors; and (iii) tortfeasors who settle with plaintiffs should be protected from all claims for contribution and indemnity by non-settling tortfeasors arising out of the alleged wrongful conduct. The adoption of such a rule would foster important public policy goals of encouraging settlements, protecting investors, and carrying out Congress' intent in enacting the federal securities laws while at the same time protecting the legitimate interests of non-settlors.

II

NO RIGHT OF CONTRIBUTION EXISTS UNDER SECTION 10(b) OF THE 1934 SECURITIES EXCHANGE ACT OR SECTION 12(2) OF THE 1933 SECURITIES ACT

The Opinion assumes that a right to contribution is generally available under the federal securities laws. This is incorrect. While certain sections of the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act") do provide for a right to contribution, the circuit courts and district courts which have considered the issue, in light of this Court's teachings in *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981) and in *Northwest Airlines, Inc.. v. Transport Workers Union of America AFL-CIO*, 451 U.S. 77 (1981), have determined that no right of contribution exists under Section 12(2) of the 1933 Act or Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder. *See, e.g., Baker, Watts & Company v. Miles & Stockbridge*, 876 F.2d 1101, 1104-1106 (4th Cir. 1989); *In re Professional Financial Manage-*

ment, Ltd., 683 F.Supp. 1283 (D.Minn. 1988); *Nelson v. Craig-Hallum, Inc.*, [1989 Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶ 94,500 (D.Minn. June 25, 1989).

For example, the court in *Nelson* addressed the specific issue of whether a right to contribution existed in actions under Rule 10b-5. *Nelson, supra*, at 93,192. In deciding this issue, the *Nelson* court relied on the analysis in *In re Professional Financial Management, Ltd.*, 683 F.Supp. 1283 (D.Minn. 1988), wherein the court held that there was no right of contribution. In this regard, the court in *Nelson* stated:

> In *Professional Financial Management*, Judge Diana Murphy followed the suggested analytical framework in addressing the precise issue presented by Terrano's contention and held that no right to contribution existed. *In re Professional Management*, 683 F.Supp. at 1285-87.
>
> In opposition to Terrano's motion, Craig Hallum cites numerous cases fcrm other circuits which take a contrary position to Judge Murphy. The Court has examined these cases, along with *Texas Industries, Northwest Airlines* and *Professional Financial Management* and finds itself persuaded by Judge Murphy's reasoning and conclusion. Congress did not expressly provide defendant a right to contribution in enacting Section 10b of the Securities Exchange Act. The policy reasons for providing such a right which Craig Hallum urges this Court to consider, and which have been considered as a basis for providing such a right in other cases, . . . were the same policy reasons which the Supreme Court resisted considering in *Texas Industries* on the grounds that Congress is the more appropriate and better equipped decision making body to pierce their complexity. *Texas Industries*, 451 U.S. at 646-47. Accordingly, Terrano's motion for summary judgment is granted.

Id. at 93,192-93.

In *Baker, Watts, supra*, the Fourth Circuit reached the same conclusion with respect to Section 12(2) claims under the 1933 Act when it held:

> It is unclear whether a federal right of action for contribution would promote the general purposes of the federal securities laws. Although some courts have stated that such a remedy may further the deterrent purposes of the 1933 and 1934 Acts, [citation omitted], much the same regulatory purpose can be ascribed to the anti-trust laws under which no implied right of action for contribution is recognized. *See Texas Industries*, 451 U.S. at 630, 101 S.Ct. at 2062. ***An even greater deterrent effect may exist if a single securities wrongdoer such as Baker, Watts, is held liable for the total adverse judgment....***

Baker, Watts, supra, at 876 F.2d at 1105-1106. [Emphasis added.] The above cases and the cases on which they rely, including this Court's own recent precedents, establish conclusively that no implied right of contribution exists under either Section 10(b) of the 1934 Act or Section 12(2) of the 1933 Act.

In these circumstances, this Court should review the Opinion's apparent holding that a right to contribution generally exists under the federal securities laws. The sole case cited in the Opinion for that proposition is *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979). The *Heizer* case predates and is inconsistent with the Supreme Court decisions upon which the above cases rely in rejecting the contention that rights of contribution exist under Rule 10b-5 or Section 12(2).[6] Indeed, *Heizer* is no longer good law in the circuit in which it was rendered. *King v. Gibbs*, 876 F. 2d 1275, 1280 (7th Cir. 1989). *See also Robin v. Doctors Office Centers Corp.*, 730 F.Supp. 122, 124 (N.D.Ill.1989) (holding that the ruling in *Heizer* that contribution is implied under Section 10(b) is no longer controlling). Applying the analysis mandated by the Supreme Court in *Texas Industries* and *Northwest Airlines*, courts in the Seventh Circuit now hold that "[n]o private cause of action for contribution may be implied under Rule 10b-5. *Robin, supra*, 730 F.Supp. at 125. *See also Financial Savings Bank, Inc. v. American Bankers Insurance Co.*, [1989-90

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[6] Unless there is a right to contribution under Rule 10b-5 or Section 12(2), the Opinion's discussion of settlement bar rules would not be applicable to those claims.

Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶ 94,827 (E.D.N.C. November 1, 1989).

III

THE OPINION DISREGARDS CONGRESS' IMPOSITION OF JOINT AND SEVERAL LIABILITY UNDER SECTION 11

Section 11(a) of the 1933 Act identifies, by category, those groups of persons who are liable for a materially misleading registration statement. Among others, Section 11(a) provides liability for every person who signs the registration statement, every person who is a director of the issuer, the issuer, an accountant or other expert who has with his consent been named as having prepared or certified any part of the registration statement and every underwriter. With respect to each of the persons liable under Section 11(a), Section 11(f) provides that "all or *any one* or more of the persons specified in subsection (a) shall be jointly and severally liable".... [Emphasis added.][7] As a result of Congress' expressed intent, any *one* of these persons may be liable to plaintiffs for the entire amount of the damages sustained thereunder.

The Opinion completely disregards this carefully crafted statutory scheme. For example, the Opinion states that "the [*pro tanto*] offset scheme forces non-settling defendants to pay more than the amount for which they are culpable." *Kaypro, supra,* 884 F.2d at 1230. This assertion is unfounded (and, if true, would be legally irrelevant). Under Section 11, each culpable party is liable to plaintiffs for the *entire amount* of the damages irrespective of their proportionate fault. Section 11(f). The Opinion also inaccurately contends that, under its settlement bar rule, non-settling defendants will never pay more than they would if all parties had gone to trial. *Kaypro, supra,* 884 F.2d at 1231. This contention is wrong. It ignores both the very wording of Section 11 and economic reality. If all defendants go to trial and lose, they are all

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[7] Section 11(e) contains special treatment for underwriters which is not relevant to the discussion here.

jointly and severally responsible to the prevailing plaintiff for the entire damages. To the extent that any responsible party is insolvent, close to insolvency or more difficult to execute on, plaintiff will collect on his judgment from the more wealthy defendants irrespective of their culpability. These defendants will then be left with their theoretical contribution claim against insolvent or nearly insolvent defendants which they, in all likelihood, will not pursue because the costs of doing so make no economic or business sense. These are the same costs which the Opinion unfairly states that plaintiffs should incur if they choose to partially settle.

The policy adopted by the Opinion is unwise for a host of reasons. There are legitimate incentives on the part of both plaintiffs and defendants to settle (as there should be) only if the hidden and unknown costs associated with the risks incurred under the Opinion do *not* exist. As such, the Opinion is contrary to public policy because it deters settlements. No plaintiff will consider a partial settlement unless it is demonstrably above the proportionate share of that person's potential responsibility. In that situation, however, a defendant is unlikely to agree to settle. In fact, experience with the 1939 version of the Uniform Contribution Among Tortfeasers Act tell us that the adoption of the Opinion will make partial settlements a rarity, if not an impossibility. In such circumstances, plaintiffs will simply not settle except on a global basis. As a result, defendants who are wealthier will be forced to pay more irrespective of their culpability. This is because the amounts to be recovered in potential partial settlements will decrease dramatically and therefore will reduce the amount of any offset. Thus, contrary to the stated purpose of the Opinion, the Opinion will actually force wealthier defendants to pay more than if the *pro tanto* rule were adopted.[8] More impor-

[8] Today, most acts of wrongdoing under the federal securities laws are covered by insurance. Therefore, the economic risk of an adverse judgment will not deter prospective wrongdoers—the insurance company and not the wrongdoers usually pay. Rather than maximizing deterrence among wrongdoers, the practical effect of the Opinion is to shift the source of payment from one group of insurance carriers to another group of insurance carriers. In this environment, the Court's

tantly, the entire judicial process, including both the parties and the court system, would be benefitted by the adoption of the *pro tanto* rule because that rule encourages the parties to negotiate reasonable settlements based upon *all* of the facts and circumstances (including the financial resources and exposure of defendants) of each particular case.

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entire discussion of deterrence among wrongdoers is legally and factually irrelevant. As the Third Circuit in *Miller* recognized, the deterrence factor should be given little, if any, weight in fashioning modern day contribution rules.

CONCLUSION

For the foregoing reasons, NASCAT requests the Court to grant the Petition so that these serious legal issues will be considered on their merits. This is especially important because the Opinion creates conflicts among the various Circuits and because the issues raised by the Opinion have national ramifications which will dramatically affect the effective private enforcement of the federal securities laws.

Dated: August 30, 1990

Respectfully submitted,

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IX.

THE TERMS OF THE SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among the Settling Plaintiffs, the Settling Defendants, and the Insurers, by and through their respective attorneys or counsel of record, as follows:

A. Definitions

As used in this Stipulation, the following terms have the meanings specified below:

(1) "Person" means an individual, corporation, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated organization, and any other type of legal entity and their heirs, successors, or assignees.

(2) "Settlement Class" means all persons, except any defendant (including members of the immediate family of each of the individual defendants, any entity in which any defendant has a controlling interest and the legal representatives, heirs, successors or assigns of any excluded party) named in the Class Action, who purchased or otherwise acquired the stock of Kaypro between August 25, 1983, and December 13, 1984, inclusive.

(3) "Settlement Class members" means all members of the Settlement Class except those persons who file valid and timely requests for exclusion pursuant to the notice of class action determination and partial settlement described in Paragraph IX.F.(1) below.

(4) "Settlement Class Period" means the period August 25, 1983, through December 13, 1984, inclusive.

(5) "Settling Plaintiffs" means each and all of the Class Representatives and the Settlement Class Members.

(6) "Settling Defendants" means each and all of the following persons: (a) Andrew F. Kay; (b) David A. Kay; (c) Allan M. Kay; (d) Mary M. Kay; (e) Arthur B. Laffer; (f) W. Bradford Ryland; (g) Ludwig Weindling; (h) Roger S. Wooley; (i) Roger S. Wooley as Executor of the Estate of Ludwig Weindling; and (j) Kaypro Corporation and each and all of its present and former officers and directors.

(7) "Insurers" means each and all of those persons identified on Exhibit "A" hereto, which shall be filed with the Court under seal.

(8) "Settled Claims" means any and all claims, actions or causes of action, rights or liabilities, including Unknown Claims, which exist or may in the future exist by reason of (i) any matter, cause or thing whatsoever, arising out of, relating to, or in any way connected with the purchase or sale or other disposition of acquisition during the Settlement Class period of any Kaypro common stock by a Settlement Class Member; (ii) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Settlement Class Member has or may in the future have by reason of any acts, omissions, or failures to act of any of the Defendants during the Settlement Class Period in (but only in) their capacities as officers, directors, employees, agents, and/or advisors of Kaypro; and (iii) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Settlement Class Member has or may in the future have arising out of or in any way connected with or related to any of the facts, circumstances, transactions, events, occurrences, acts or omis-

sions or failures to act, of whatever kind or character whatsoever, irrespective of the state of mind of the actor performing, or omitting to perform the same, that are or could have been alleged, referred to, alluded to, or reflected in the Class Action.

(9) "Unknown Claims" as used in the definition of Settled Claims in Paragraph IX.A.(8) hereof, means claims which the Settlement Class Members do not know or suspect to exist in their favor at the time of the release of the Settling Defendants which if known by them might have affected their settlement with Settling Defendants. Solely with respect to any and all Settled Claims asserted against the Settling Defendants, it is the intention of the parties hereto that, upon the Effective Date, as defined below, each of the Settlement Class Members does hereby expressly waive and relinquish, to the fullest extent permitted by law, the provisions, rights, and benefits of section 1542 of the California Civil Code, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

i.e., any and all provisions, rights and benefits of any similar statute or law of California or of any other jurisdiction. Each of the Settlement Class Members further acknowledges hereby that said Settlement Class Member is aware that said Settlement Class Member may hereafter discover facts in addition to or different from those which said Settlement Class Member now knows or believes to be true with respect to the subject matter of the release, but that it is the Settlement Class Member's intention to, and each Settlement Class Member does hereby, upon the Effective Date, fully, finally and forever

settle and release any and all Settled Claims asserted against the Settling Defendants only, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden which now exist, may hereafter exist, or heretofore have existed, and without regard to the subsequent discovery or existence of such different or additional facts. All of the foregoing is the definition of "Unknown Claims."

(10) "Settlement Fund" means Nine Million Two Hundred Fifty Thousand Dollars ($9,250,000) in cash or cash equivalents, plus such interest earned on or imputed to said sum after transfer to the Escrow Agent.

(11) "Effective Date," or the date on which the settlement embodied in this stipulation becomes "effective," means the date on which the Court's judgment (the "Judgment"), substantially in the form of Exhibit D hereto, becomes final, *i.e.,* 35 days after the entry of the Judgment if no appeal by a Settlement Class Member is filed. If an appeal by a Settlement Class Member is filed, the Effective Date shall be the date of the final affirmance on appeal, the expiration of the time for petitions for writs of certiorari to the U.S. Supreme Court and, if certiorari be granted, the date of final affirmance following review pursuant to that grant; or the final dismissal of any appeal or proceedings on certiorari to the U.S. Supreme Court. No appeal or attempted appeal or any other attempt to secure other appellate review of the Judgment by any Non-Settling Defendant shall affect the finality or the Effective Date of the Settlement in any way.

(12) "Non-Settling Defendant" means (a) Peat, Marwick Mitchell & Co. ("Peat"); (b) Prudential-Bache Securities, Inc., individually, and as the representative of all underwriters who, pursuant to an Underwriting Agreement, participated in the registered public offering and

sale of Kaypro common stock on or about August 25, 1983 ("Underwriters Group"); and (c) the Underwriters (and/or their successors-in-interest) listed on Exhibit C hereto. Settlement Counsel represent and warrant that they will not hereafter assert the Settled Claims against any Person other than the Non-Settling Defendants.

(13) "Escrow Agent" means Milberg Weiss Bershad Specthrie & Lerach and Wolf Popper Ross Wolf & Jones or their successors, as the parties may agree upon, which Escrow Agent shall perform its duties as set forth in this Stipulation.

(14) "Settlement Counsel" means the law firms of Milberg Weiss Bershad Specthrie & Lerach and Wolf Popper Ross Wolf & Jones.

B. Transfer of Funds

(1) Within ten (10) business days of the execution of this Stipulation, the payments comprising the Settlement Fund shall be delivered to the Escrow Agent pursuant to the terms of this Stipulation. Such payments may not be disbursed by the Escrow Agent, except as provided in this Stipulation, an Order of the Court or the agreement of the parties.

(2) The Escrow Agent shall invest the Settlement Fund deposited pursuant to Paragraph IX.B.(1) above, at current market rates in certificates of deposit, money market funds or U.S. T-Bills (the "Escrow Securities") and shall reinvest the proceeds of the Escrow Securities as they mature in similar Escrow Securities at the current market rates.

C. Notice, Administration, Claims Solicitation and Assistance Fund

(1) As soon as practicable after the payments required by paragraph IX.B.(1) are deposited in escrow, the Escrow Agent shall establish a fund separate from the Settlement Fund (the "Notice and Administration Fund") and shall pay $100,000 into the Notice and Administration Fund. The Notice and Administration Fund may be used by Settlement Counsel, without recourse, to pay the costs of indentifying and notifying members of the Settlement Class, soliciting the filing of claims by them, assisting them in making their claims and otherwise administering, on behalf of the Settlement Class, the settlement embodied in this Stipulation.

(2) On the Effective Date, any balance then remaining in the Notice and Administration Fund, less expenses incurred but not yet paid, shall be made a part of the Settlement Fund. Thereafter, Settlement Counsel shall have the right to use such portions of the Settlement Fund as are, in the exercise of their reasonable judgment, necessary to carry out the purposes set forth in paragraph IX.C.(1).

D. Deposit and Exchange of Releases

(1) As soon as practicable after the execution of the Stipulation, each Settling Defendant shall deliver to their respective counsel, in the form of Exhibit E hereto, mutual releases of all claims, if any, that the Settling Defendants may have against each other based on the Settled Claims. On the Effective Date, their respective counsel shall deliver forthwith these releases to the respective counsel for the other Settling Defendants as their interests may then appear.

Said releases shall contain language which renders the releases null and void until the occurrence of the Effective Date.

(2) As soon as practicable after the execution of the Stipulation, each Settling Defendant shall deliver to the Escrow Agent separate executed releases of each Non-Settling Defendant for the claims that such Settling Defendant may have against such Non-Settling Defendant that are based on or arise from the Settled Claims of each Settling Plaintiff. Such releases shall be substantially in the form of Exhibit F hereto and shall be delivered to the Escrow Agent with appropriate written irrevocable instructions providing that the Escrow Agent shall deliver those releases to a Non-Settling Defendant only when (a) all of the events set forth in Paragraph IX.H. below shall have occurred; (b) the Settling Plaintiffs shall have settled the Settled Claims with a Non-Settling Defendant, which settlement is embodied in a final judgment within the meaning of Paragraph IX.G. below; and (c) a Non-Settling Defendant shall have deposited with the Escrow Agent the executed releases described in Paragraph IX.D.(3) below with appropriate written instructions to deliver such releases to the Settling Defendants.

(3) Each of the Settling Plaintiffs agrees that he or she shall not hereafter release, dismiss or settle any claims asserted in the Class Action against a Non-Settling Defendant without the execution by such Non-Settling Defendant of a release of all claims which such Non-Settling Defendant may have against the Settling Defendants that are based on or arise from the Settled Claims of said Settling Plaintiff, which releases shall be substantially in the form of Exhibit G hereto.

E. The Good Faith Hearing

(1) Promptly after execution of this Stipulation, the parties hereto shall jointly move the Court for an order and Judgment (the "Good Faith Order"), substantially in the form of Exhibit H hereto, providing, *inter alia*, (a) that the settlement embodied in this Stipulation is entered into and made in good faith, within the meaning of Sections 877 and 877.6 of the California Code of Civil Procedure, and (b) that all claims for contribution, indemnification, or reimbursement, however denominated, against the Settling Defendants arising under the federal securities laws or state law, including those based in tort, contract or statute, or any other body of law, in favor of persons, including the Non-Settling Defendants, who are asserted to be or who may be joint tortfeasors or wrongdoers, however denominated, with the Settling Defendants in the Settled Claims and based upon or arising from the Settled Claims are extinguished, discharged, satisfied and/or otherwise unenforceable. At the Good Faith Hearing, the Court, or, upon reference, to which reference the parties hereby stipulate, the Honorable Harry R. McCue, United States Magistrate, or his successor, shall be requested by the parties hereto to consider evidence and make findings (or, in the case of Magistrate McCue or his successor, make recommendations to the Court) on those issues which are deemed relevant to the entry of the Good Faith Order.

F. The Notice Order

Promptly after execution of this Stipulation, the Class Representatives shall move the Court for an order (the "Notice Order"), substantially in the form of Exhibit B hereto, providing for notice to the Settlement Class of and hearing on the proposed settlement (the "Settlement

Hearing"). Unless otherwise ordered by the Court, the Settlement Hearing shall occur contemporaneously with the hearing on the Good Faith Order. The Notice Order shall specifically include provisions which, among other things:

(1) Approve forms of notice for mailing to members of the Settlement Class that shall notify Settlement Class Members of the hearing (i) in connection with the Good Faith Order, (ii) on approval of the settlement, and (iii) plaintiffs' counsel's application for attorneys' fees and reimbursement of expenses (the "Settlement Notice");

(2) Approve a summary notice of the hearing on proposed settlement for publication to members of the Settlement Class (the "Summary Notice");

(3) Direct Settlement Counsel to mail or cause to be mailed the Settlement Notice to those members of the Settlement Class who can be identified through reasonable effort. Nominees who purchased Kaypro common stock during the Settlement Class Period will also be requested to send the Settlement Notice to all beneficial owners within ten (10) days after receipt of the Settlement Notice or to send a list of said names and their addresses to Settlement Counsel within ten (10) days of receipt of the Notice;

(4) Direct Settlement Counsel to cause the Summary Notice to be published in the national edition of *The Wall Street Journal*;

(5) Find that the mailing and publication pursuant to Paragraphs 3 and 4 constitute the best notice practicable under the circumstances, including individual notice of all such members of the Settlement Class who can be identified through reasonable effort, and is due and suffi-

cient notice of the matters set forth in the Settlement Notice to all such members of the Settlement Class, and that the Settlement Notice and Summary Notice fully satisfy the requirements of due process and of Rule 23 of the Federal Rules of Civil Procedure;

(6) Provide that any members of the Settlement Class who so desire may exercise the right to exclude themselves from the Certified Class but only if they comply with the requirements for so doing as set forth in the Settlement Notice;

(7) Schedule the Settlement Hearing to be held by the Honorable Harry R. McCue, United States Magistrate or his successor, contemporaneously with the hearing on the Good Faith Order to determine whether the proposed settlement should be approved as fair, reasonable and adequate and whether an order approving the settlement should be entered thereon, and to award counsel fees and expenses to plaintiffs' counsel;

(8) Provide that any objections to the proposed settlement shall be heard and any papers submitted in support of said objections shall be received and considered by the Honorable Harry R. McCue, United States Magistrate, or his successor, at the Settlement Hearing (unless, in its discretion, the Court shall direct otherwise) only if, on or before a date to be specified in the Notice Order, persons making objections shall file notice of their intention to appear and copies of any papers in support of their position with the clerk of the Court and serve such notice and papers on counsel to the parties to this stipulation; and

(9) Provide that all Settlement Class Members, whether or not they file a proof of claim within the time provided for, shall be barred from asserting any Settled

Claims against any of the Settling Defendants, and any such Settlement Class Members shall be conclusively deemed to have released any and all such Settled Claims;

(10) Provide that, unless otherwise ordered by the Court, any person that is not a Settlement Class Member shall have no right to any portion or in the distribution of the Settlement Fund; and

(11) Provide that the Settlement hearing may, from time to time, and without further notice to the Settlement Class, be continued or adjourned by Order of the Court.

G. Judgment To Be Entered By The Court Approving The Settlement

Upon approval by the Honorable Harry R. McCue, United States Magistrate, or his successor, of the settlement of the Class Action contemplated by this Stipulation, a judgment shall be entered by the Court, substantially in the form of Exhibit D attached hereto, which shall:

(1) Approve the settlement embodied in this Stipulation as fair, reasonable and adequate to the Settlement Class;

(2) Dismiss the Class Action as against the Settling Defendants, with prejudice and without costs to any party as against any other;

(3) Adjudge, subject to Paragraph IX.I below, that the Settling Plaintiffs shall be deemed conclusively to have released any rights, claims or causes of action against the Settling Defendants and the Insurers only, including, without limitation (but excluding the Non-Settling Defendants), their respective predecessors and successors, parents, subsidiaries and affiliates, and all their present and former partners, principals, officers, directors, rein-

surers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators arising out of or based upon the Settled Claims and any and all claims against the Insurers under California Insurance Code, Section 790.03(h);

(4) Bar and permanently enjoin all Settling Plaintiffs from prosecuting the Settled Claims against the Settling Defendants and the Insurers, including, without limitation (but excluding the Non-Settling Defendants), their respective predecessors and successors, parents, subsidiaries and affiliates, and all of their present and former partners, principals, officers, directors, reinsurers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators; and

(5) Reserve jurisdiction, without affecting the finality of the judgment entered, over: (a) implementation of this settlement and any award or distribution of the Settlement Fund, including interest earned thereon; (b) disposition of the Settlement Fund; (c) hearing and determining applications for attorney's fees, costs, interest, expenses (including fees and costs of experts and/or consultants) in the Class Action; and (d) enforcing and administering this Stipulation.

H. Conditions of Settlement

(1) This Stipulation shall be effective only on the condition that all of the following events occur:

(a) The Settling Defendants timely deliver the Settlement Fund, as required by Paragraphs IX.B., and the releases, as required by Paragraph IX.D. above;

(b) The Court enters the Good Faith Order, as required by Paragraph IX.E. above;

(c) The court enters the Notice Order, as required by Paragraph IX.F. above;

(d) The Court enters the judgment, as required by Paragraph IX.G. above; and

(e) The Representative Plaintiffs obtain an Order of the Court which redefines the scope of the class as provided in Paragraph III.B. above;

(f) The number of shares of Kaypro stock purchased by members of the class who seek, and obtain exclusion therefrom is below certain limits as set forth in Exhibit I hereto, and/or the Settling Defendants decline to exercise their option to withdraw from the Settlement under such circumstances, as set forth in Exhibit J hereto; and

(g) There is an Effective Date.

(2) Upon the occurrence of all of the events referenced in Paragraph IX.H.(1) above, each of the Settling Plaintiffs, subject to the provisions of Paragraph IX.I. below, (a) agrees to dismiss the Class Action against the Settling Defendants, (b) acknowledges full and complete satisfaction of, and does hereby fully, finally and forever settle, release and discharge each and all of the Settling Defendants and Insurers (but excluding the Non-Settling Defendants) and all of their past and present agents, employees, officers, directors, partners, members, shareholders, and their estates, the personal representatives of their estates, executors, heirs, successors, and assigns, who are or ever may become liable with respect to the Settled Claims.

(4) Upon the occurrence of all of the events referenced in Paragraph IX.H.(2) above, any and all interest or rights of the Settling Defendants or the Insurers in or to the Settlement Fund shall be absolutely and forever extinguished.

I. Effect of Disapproval, Cancellation Or Termination

(1) If the Court does not enter the judgment provided for in Paragraph IX.G., or if the Court enters the judgment and appellate review is sought and on such review such judgment is materially modified or reversed, then this Stipulation shall not be cancelled and terminated if all parties to this Stipulation who are adversely affected thereby, within thirty (30) days from the date of the mailing of such ruling to such parties, provide written notice to all other parties hereto of their intent to proceed with this Stipulation. Such notice may be provided on behalf of each party to this Stipulation by their counsel and, on behalf of the Settlement Class, by Settlement Counsel. Neither a modification nor reversal on appeal of any amount of fees, costs, expenses and interest awarded by the Court to any of the Class Representatives, the named plaintiffs or their counsel in the Class Action shall be deemed a material modification of or a part of the material terms of the judgment or this Stipulation.

(2) Excepting only an appeal filed by a Settlement Class Member, the partial settlement shall become final after the Judgment is entered by the District Court approving the Settlement and the Good Faith Order is entered extinguishing the claims of the Non-Settling Defendants. Any appeal by the Non-Settling Defendants from either the Good Faith Order approving the partial settlement or the Judgment extinguishing claims of the Non-Settling Defendants shall not affect the finality of the Settlement between the settling parties or the payment of the fees awarded to plaintiffs' counsel. Upon a successful appeal by the Non-Settling Defendants, however, the Settlement as to the Plaintiff Class shall remain binding and shall convert to a reduction in judgment settlement. The purpose and effect of such a judgment

reduction settlement is to protect the Settling Defendants individually and collectively against any liability for any amount in excess of the Settlement Amount with respect to the Settled Claims or claims for contribution, indemnification, or reimbursement, however denominated, against the Settling Defendants arising under the federal securities laws or state law, including those based in tort, contract or statute, or any other body of law, in favor of persons, including the Non-Settling Defendants who are asserted to be or who may be joint tortfeasors or wrongdoers, however denominated, with the Settling Defendants in the Settled Claims and based upon or arising from the Settled Claims, *i.e.*, any judgment entered against any Non-Settling Defendant would be reduced by the amount of the Settlement between Settling Plaintiffs and Settling Defendants or by the amount of the Settling Defendants' share of the damages, whichever is greater.

(3) If the Effective Date does not occur, or if this Stipulation is terminated or cancelled pursuant to its terms, then, within ten (10) business days after written notification of such event is mailed by Settlement Counsel to the Settling Defendants, the Settlement Fund, plus any amount then remaining in the Notice and Administration Fund, less reasonable Escrow Agent fees and expenses, and any costs disbursed or chargeable to the Notice and Administration Fund, shall be refunded to the agent designated by the Settling Defendants.

(4) If the Effective Date does not occur, or if this Stipulation is terminated pursuant to its terms, neither the Settling Plaintiffs nor any of their counsel shall have any obligation to repay any amounts disbursed from the Notice and Administration Fund. In addition, any expenses already incurred and properly chargeable to the Notice and Administration Fund at the time of such

termination or cancellation but which have not been paid shall be paid by the Escrow Agent is accordance with the terms of this Stipulation prior to said funds being refunded to the agent designated by the Settling Defendants.

(5) If the Effective Date does not occur, or if this Stipulation is terminated or cancelled pursuant to its terms, the parties to this Stipulation shall be deemed to have reverted to their respective status as of the date and time immediately prior to the execution of this Stipulation, and they shall proceed in all respects as if this Stipulation and related orders had not been executed.

J. Escrow Agent

(1) Settlement Counsel are authorized to execute such transactions on behalf of the Settlement Class as are consistent with the terms of this Stipulation.

(2) All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court until such time as such funds shall be distributed pursuant to further order of the Court.

K. Administration and Calculation of Claims, Final Awards and Distributions of Settlement Fund

(1) Settlement Counsel, or their authorized agents, acting on behalf of the Settlement Class, and subject to the supervision, direction and approval of the Court, shall administer and calculate the claims submitted by Settlement Class Members and shall oversee distribution of that portion of the Settlement Fund that is finally awarded by the Court to the Settlement Class.

(2) On and after the Effective Date, the Settlement Fund shall be applied, subject to the approval and further order(s) of the Court, as follows:

(a) To pay counsel to the named plaintiffs in the Class Action attorneys' fees and costs, interest and expenses, including the fees of experts and consultants, if and to the extent allowed by the Court. It is agreed that the procedure for and the allowance or disallowance by the Court of any applications by any of the counsel to the named plaintiffs in the Class Action for attorneys' fees, costs, expenses and interest, including the fees of experts and consultants, to be paid out of the Settlement Fund, are not part of this Stipulation, and any order or proceeding relating thereto shall not operate to terminate or cancel this Stipulation or affect its finality; and

(b) To pay all unpaid costs and expenses incurred in connection with providing notice to members of the Settlement Class, locating Settlement Class Members, soliciting Class claims, assisting with the filing of claims, and in administering and distributing the Settlement Fund to the Settlement Class, and processing proofs of claim, escrow fees and costs and the costs of processing requests for exclusion.

(3) The balance of the Settlement Fund (the "Claimants' Fund") shall be allocated among Settlement Class Members who submit valid, timely proofs of claim ("Authorized Claimants"), in the following manner (the amount so allocated to each Authorized Claimant constituting his or her Payable Claim):

(a) Each such Authorized Claimant will receive an amount which bears the same ratio to the Claimants' Fund as his or her recognized loss bears to the total of all such Authorized Claimants' recognized losses. Recog-

nized loss for purchasers of Kaypro common stock is defined as an amount equal to the amount paid (inclusive of commissions) for all Kaypro stock purchased during the Class Period less the sum of (i) the amount realized (after commissions) from the sale of any such shares sold on or before December 13, 1984, and (ii) the number of any such shares held at the close of business on December 13, 1984, multiplied by $2.88, the closing bid price of Kaypro common stock on December 14, 1984.

(b) Payment in the manner set forth above shall be deemed conclusive against all Authorized Claimants. All Authorized Claimants who fail to file valid and timely proofs of claim shall be barred from participating in distributions from the Claimants' Fund (unless otherwise ordered by the Court), but otherwise shall be bound by all of the terms of this Stipulation, including the terms of any judgment entered and the releases given.

(4) The Settling Defendants shall have no obligations or liabilities or any kind whatsoever in connection with the determination, administration, calculation or payment of claims.

L. Miscellaneous Provision

(1) The parties hereto consent, pursuant to 28 U.S.C. § 636 and Rule 73 of the Federal Rules of Civil Procedure, to United States Magistrate Harry R. McCue conducting all proceedings and entering such orders and judgments as are necessary or required to approve and implement the Settlement, to consider and enter orders concerning plaintiffs' counsels' application for award of attorneys' fees and reimbursement of expenses and to make recommendations to the District Court regarding the Good Faith Order.

(2) At the request of Settlement Counsel, the Settling Defendants agree to be available for interview. At the request of Settlement Counsel, the Settling Defendants agree to attend and testify at the trial of the Class Action or any other actions initiated by the Settling Plaintiffs arising out of the Settled Claims. The requesting counsel agree to give reasonable notice of the scheduled date for any such interview or testimony; to reimburse each such Settling Defendant for his round-trip travel expenses from his then location to the place of trial or interview and his expenses of lodging, meals and local ground travel while making such trip, awaiting such testimony or interview and testifying; and to make such reimbursement no later than ten (10) days after the witness has submitted a statement to Settlement Counsel for the expenses incurred.

(3) Representative Plaintiffs, and each of them, and on behalf of all persons engaged by them to assist them in the prosecution of the Class Action, including, but not limited to, their counsel, attorneys, experts, accountants and agents, agree, to the extent permitted by law, that they shall not provide nor advise, counsel, assistance, documentation, analyses or work product to any person who requests exclusion from the Settlement Class in the prosecution of any claims arising out of, based upon, or otherwise related to the factual allegations or pleadings in the Class Actions.

(4) Nothing in this Stipulation shall be construed to, or contended to, waive or otherwise affect the right of the Settling Plaintiffs to proceed and/or recover against the Non-Settling Defendants in the Class Action.

(5) The parties hereto agree to cooperate to the extent necessary to effectuate all terms and conditions of this Stipulation.

(6) All of the exhibits attached hereto are hereby incorporated by this reference as though fully set forth herein.

(7) This Stipulation may be amended or modified only by a written instrument signed by all parties or their successors-in-interest.

(8) With the exception of any agreements or understandings between and among the Insurers and the Settling Defendants, this Stipulation and the exhibits attached hereto constitute the entire agreement among the parties hereto and no representations, warranties or inducements have been made to any party concerning this Stipulation or its exhibits other than the representations, warranties and covenants contained and memorialized in such documents.

(9) Settlement Counsel, on behalf of the Settlement Class, are expressly authorized by the Class Representatives to take all appropriate action required or permitted to be taken by the Settlement Class pursuant to this Stipulation to effectuate its terms and are also expressly authorized to enter into any modifications or amendments to this Stipulation on behalf of the Settlement Class which they deem appropriate.

(10) Counsel for each Settling Defendant and counsel for the Insurers are authorized to sign this Stipulation on behalf of their respective clients.

(11) This Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Counsel for the parties to this Stipulation shall exchange among themselves original signed counterparts and a complete set of original executed counterparts shall be filed with the Court.

(12) This Stipulation shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto.

(13) All terms of this Stipulation and the exhibits hereto shall be governed by and interpreted according to the laws of the State of California.

(14) All parties shall use best efforts to perform all terms of this Stipulation.

(15) All parties hereto submit to the jurisdiction of the Court for purposes of implementing the settlement embodied in this Stipulation.

IN WITNESS WHEREOF, the parties hereto have caused this Stipulation to be executed, by their duly authorized attorneys, as of the day and year first above written.

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WILLIAM S. LERACH
KEITH F. PARK
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Dated: August 10, 1987 By: /s/
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Dated: July 13, 1987

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Dated: July 6, 1987

By: /s/
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APPROVED AS TO FORM:

Dated: July 6, 1987

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[Exhibits Omitted]

APPENDIX E

[Not For Publication]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE FRANKLIN, On Behalf of Himself and All Others Similarly Situated,
Plaintiffs,
v.
KAYPRO CORPORATION; ANDREW F. KAY; DAVID KAY; ALLAN M. KAY; MARY M. KAY; PRUDENTIAL-BACHE SECURITIES, INC.
Defendants.
In Re: KAYPRO CORPORATION, Shareholder Litigation, PRUDENTIAL-BACHE SECURITIES, INC.,
Defendant-Cross-claimant-Appellant,
v.
KAYPRO CORPORATION; ANDREW F. KAY; DAVID A. KAY; ALLAN M. KAY,
Plaintiffs-Cross-claimants-Appellees.
In Re: KAYPRO CORPORATION SECURITIES LITIGATION

GEORGE FRANKLIN, On Behalf of Himself and All Others Similarly Situtated, JON QUINT; ELLEN QUINT; STEFAN REZNIK; WILLIAM B. WEINBERGER; RICHARD LOWE; PAUL L. HOLMES; EVELYN S. HOLMES,
Plaintiffs-Appellees,
v.
KAYPRO CORPORATION; ANDREW F. KAY; DAVID A. KAY; ALLAN M. KAY; MARY M. KAY; ARTHUR B. LAFFER; BRADFORD W. RYLAND; LUDWIG WEINDLING; ROGER S. WOOLEY,
Defendants-Appellants,
v.
PEAT MARWICK MAIN & COMPANY
Defendant-Appellant.

C.A. Nos. 88-5931, 88-5934
D.C. No. CV-84-2091-N

Order
Filed April 10, 1990

Before: FARRIS, FERGUSON and BEEZER,
Circuit Judges

The panel has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. A vote was taken of the active judges and has failed to receive a majority of votes in favor of en banc consideration. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

Civil No. 85-4302

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

WILLIAM F. DALTON, individually and as a
representative of a bondholder class,

vs.

ALSTON & BYRD, et al.,
Defendants.

MEMORANDUM AND ORDER
Filed May 24, 1990

FOREMAN, Chief Judge:

The Court has carefully considered the motion for approval of the settlements between the plaintiff class and the settling defendants, namely the Gallop, Johnson defendants, Hospital Management Associates, Inc. and H.M.A., Inc. (collectively referred to as HMA), and Peter Orr. By separate order, the Court has ruled on the fairness of those settlements. This order addresses those portions of the settlement agreements that seek to bar cross-claims by the non-settling defendants and others against the settling defendants. The Court, being fully advised of the relevant facts and the law, finds that a complete pretrial bar of any and all cross-claims would further the policies of the federal courts of encouraging settlements and avoiding a multiplicity of suits.

FINDINGS OF FACT

By separate orders, the Court has expressed its opinion on the fairness and good faith of the settlements between the plaintiff class and the settling defendants. The Court finds that the discovery in this case has been completed

and the time limit for all substantive motions has expired. Having taken judicial notice of the entire record, in particular the pleadings and affidavits filed regarding plaintiffs' motion for class certification and the numerous motions for summary judgment filed by the defendants, the Court finds that the settling defendants have paid an amount reasonably proportionate to their liability in this case.

CONCLUSIONS OF LAW

Assuming that a right of contribution exists for these claims, an order barring any actions for indemnity or contribution must also provide for the reduction of the non-settling defendants' liability. There are three methods of dealing with this problem: 1) not issue a bar order; 2) issue the order and deduct the entire amount of the settlement from any jury verdict and apportion the remainder among the non-settling defendants; or 3) issue the order and declare that the amount paid by the settling defendant represents that defendant's proportionate share of whatever judgment is ultimately entered in the case. *Franklin v. Kaypro Corp.,* 884 F.2d 1222, 1229-1232 (9th Cir. 1989).

The first alternative should be rejected. This would make settlements less likely and has been disapproved by other courts. *Franklin,* 884 F.2d at 1229.

The second alternative, allowing the settlement amount to operate as a set-off against the liability of the other defendants, was adopted by the Second Circuit in *Singer v. Olympia Brewing Co.,* 878 F.2d 596 (2d Cir. 1989). The court first stated that, in securities litigation based on federal law, a uniform rule of settlement credit is appropriate. *Id.* at 599. The rule adopted in that case is referred to as the "one satisfaction rule" or a *pro-tanto* method.

"Under this rule, when a plaintiff receives a settlement from one defendant, a nonsettling defendant is entitled to a credit of the settlement amount against any judgment obtained by the plaintiff against a nonsettling defendant as long as both the settlement and the judgment represent common damages." *Id.* at 600.

The third approach, adopted in *Franklin*, is the approach urged by the non-settling defendants. The *Franklin* court rejected the *Singer* approach for two reasons. First, the one satisfaction rule may result in additional liability for the non-settling defendants. For example, two defendants would each be liable for $100,000 to the plaintiff, who has suffered $200,000 in common damages. If one defendant settles for $80,000, the other defendant would be liable for $120,000 to the plaintiff, or $20,000 more than if the settlement did not occur. See *Franklin*, 884 F.2d at 1230 n.15 (expressing this concept through the formula $(S - x) + (N + x) = T$, where T equals total liability, S equals the settling defendant's share of the liability, N equals the non-settling defendant's share of the liability, and x equals the excess). The *Franklin* court rejected the idea that a hearing on the good faith of the settlement would remove this problem, since, in order for a court to accurately determine whether a settlement would cause the non-settling defendant to pay more than its fair share would involve a mini-trial on the parties' relative culpability. *Franklin*, 884 F.2d at 1230.

The second reason that the *Franklin* court rejected the one-satisfaction rule is that it would interfere with the dynamics of settlement. *Id.* Settlements are attractive because they reduce the costs of litigation. This cost (i.e. the cost of trial or completing discovery) must be discounted from every settlement to determine its fairness. Under the one-satisfaction rule, the non-settling defend-

ants are required to pay the price of this discount. In the above example, assume that the cost of trial is $10,000. Thus, the plaintiffs, who expect to recover $200,000 after a trial, would gladly settle for $190,000 (the amount of recovery less cost of trial). If one defendant settles for $80,000, and the jury returns a verdict for $200,000, the plaintiff would receive $190,000 after the trial ($80,000 from the settlement, $120,000 from the non-settling defendant, less $10,000 to go to trial). The non-settling defendant, in effect, pays the entire cost of the trial rather than the $5,000 it would pay if both defendants went to trial.

The approach adopted by the *Franklin* court eliminates the problem of overpayment by one of the defendants. Under this approach (referred to as a pro-rata approach), "[a]t trial, the jury is asked not only to determine the total dollar damage amount, but also the percentage of culpability of each of the nonsettling defendants as that of the settling defendants. Nonsettling defendants as a whole will then be required to pay the percentage of the total amount for which they are responsible. The nonsettling defendants will be jointly and severally liable for that percentage, and will continue to have rights of contribution against one another." *Franklin,* 884 F.2d at 1231. In the above example, the jury would be asked to find total damages, and return a verdict for $200,000. The jury will then be asked to apportion fault and, in this case, will find each defendant liable for $100,000. The plaintiff will then recover an additional $100,000, for a total of $180,000.

The Court believes that the *Singer* approach is the better approach to this problem. First, the *Singer* approach is much easier in application. The jury need not determine the relative fault of all defendants, including

those defendants who are no longer participating in the trial. Under the *Franklin* approach an exact apportionment of liability needs to occur at some point, i.e. at the trial. Second, the *Singer* approach is equitable. The fairness hearing ascertains whether the settlement is fair in light of the potential liability of the defendant and in light of the chances of recovery. Thus, the fairness hearing prevents other defendants from paying far in excess of their share of liability. Even under the one-satisfaction rule, fairness hearings need not become more complicated than they already are. Under the one-satisfaction, no such apportionment ever needs to be made. Third, the *Singer* approach provides finality to the settlement. The settling defendants are no longer a part of the litigation, and thus large portions of the trial may be omitted. Under the *Franklin* approach, the settling defendants' liability needs to be determined, and thus their activities remain part of the trial. Fourth, the *Singer* approach encourages settlements, while the *Franklin* approach discourages settlements. Under *Singer,* the uncertainties of trial are increased, and thus parties are more likely to settle. Under *Franklin,* a party is guaranteed that it will never pay more than its share of the damages, thus decreasing the risks of trial.

Most importantly, the entire focus of the *Franklin* court is on fairness to the defendants. A court's role in approving a class action settlement is to insure that the settlement is fair to the absent class members. *Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir. 1975), cert. denied 423 U.S. 864; MCL 2d § 30.41 at 236. This does not give a court carte blanche to disregard the rights of non-settling defenants. However, in determining the effect of a bar order, the court must weigh the interests of both the non-settling defendants and the plaintiffs. The defendants are not absent; they have a full

and fair opportunity to be represented by individual counsel. The defendants have the opportunity to protect themselves if it appears that the settlement will result in higher liability (either by objecting to the settlement or by entering into a settlement themselves). Furthermore, plaintiffs are prejudiced under the *Franklin* approach. This approach allows the non-settling defendants to adopt a trial strategy of blaming the settling defendants for the plaintiff's injury in the hope that their share of the total liability will thus be smaller. The plaintiff would, of course, be allowed to present evidence to refute this strategy, but that evidence will probably not be as effective since a plaintiff will not be intimately familiar with the settling defendant's activities.

Another reason for adopting the *Singer* approach is that it is in line with state law. See Ill. Rev. Stat. ch. 70 ¶ 302; Restatement (Second) of Torts § 885(3) (1979). Since most federal securities claims will also have pendent state law claims, an approach which is compatible with state law would be much easier to administer.

Therefore, the Court concludes that the pro-tanto or "one satisfaction" method of reducing a non-settling defendant's liability is preferable to the pro-rata method used in *Franklin*.

The Court also concludes that any bar order entered in this case must also bar any claims for contribution or indemnification by the settling defendants against the non-settling defendants.

ORDER

Wherefore, it is ORDERED that:

1) All claims by the non-settling defendants against H.M.A., Inc., Hospital Management Associates, Inc., Gal-

lop, Johnson, and Peter Orr, for contribution and indemnification under the federal securities laws, the state securities laws, RICO and any and all common law claims and all other claims arising out of the offer, purchase, sale or retention of the Jefferson County Health Facilities Authority First Mortgage Bonds are hereby extinguished, discharged and barred;

2) The non-settling defendants are entitled to a reduction in the amount of damages awarded against them in an amount no more than the total of the partial settlement amount paid by Gallop, Johnson, H.M.A., Inc., Hospital Management Associates, Inc., and Peter Orr;

3) The settlement bar shall also bar cross-claims for contribution and indemnification under the federal securities laws, state securities laws, RICO, and any and all common law claims by Gallop, Johnson, H.M.A., Inc., Hospital Management Associates, Inc., and Peter Orr against the non-settling defendants and all other persons, corporations and entities; IT IS SO ORDERED.

DATED: May 24, 1990.

JAMES L. FOREMAN
Chief Judge